IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 177 of 2005
In
COMPANY PETITION No. 225 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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BANK OF INDIA - Applicant
Versus
O.L. OF PHAR EAST LABORATORIES LTD. & 1 - Respondents

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Appearance :
MR JT TRIVEDI for Applicant.
OFFICIAL LIQUIDATOR for Respondent No. 1.

MR DEVANG D TRIVEDI for Respondent No. 2.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 09/03/2006

ORAL JUDGMENT

1.The applicant, namely, Bank of India has taken out the Judge's Summons praying for the relief that the order passed by this Court on 15.04.2005 in Company Petition No. 225 of 1997 in the case of M/s. Phar-East Laboratories Limited (Now in liquidation) be modified to the extent that the direction given in the said order to the Official Liquidator to take possession of the assets of M/s. Phar-East Laboratories Limited be recalled.

2.Mr. K.K. Nair, Assistant General Manager of the applicant Bank has filed an affidavit in support of the Judge's Summons. It is a case of the applicant bank that M/s. Phar East

Laboratories Limited has been ordered to be wound up by an order passed by this Court on 15.04.2005. The Official Liquidator attached to this Court has been appointed as the Liquidator of the said Company and he has been directed to take possession of the assets of the said Company in liquidation. It is also the case of the applicant bank that the applicant bank has advanced large scale credit facilities to the said Company from time to time and requisite security documents have been executed, signed and delivered to the applicant in whose favour equitable mortgage of the immovable properties of the Company situated at Shardavadi, Vavdi Bujarg, Godhra has been created and there has been hypothecation of certain assets of the said Company. The charges in favour of the applicant Bank have been registered with the Registrar of Companies, Gujarat, Ahmedabad. The applicant Bank therefore is a secured creditor of the

said Company. The applicant Bank has filed O.A. No. 119 of 2000 in the D.R.T. at Ahmedabad for recovery of its dues, then aggregating Rs.5,58,44,453/-, together with running interest @ 16.22% p.a. to be quarterly rests and also, penal interest @ 2% p.a. in addition, commencing from the date 10.03.2000, i.e. the date of the filing of the said application, until payment/satisfaction of the dues of the applicant Bank. While the said application has been pending before the D.R.T., the applicant Bank has taken action under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and already taken possession of the assets of the said Company on 18.04.2005. Before taking such possession, the applicant Bank has issued notice of demand on 10.10.2003 under Section 13 (2) of the Securitisation Act. The Company in liquidation has filed Special Civil Application No. 17959

of 2003 before this Court and obtained interim relief therein. However, interim relief was vacated by this Court on 23.12.2004 and ultimately, the actual physical possession of the assets of the Company has been taken over on 18.04.2005.

3.It is also the case of the applicant Bank that the Company in liquidation has never pointed out that winding up petitions against the Company had been pending before this Court. It is also the case of the applicant Bank that the applicant Bank is a secured creditor and is outside the winding up proceedings. When the possession has been taken under the provisions of the Securitisation Act, such possession deserves to be protected. It is, therefore, prayed that the order passed by this Court in Company Petition No. 225 of 1997 on 15.04.2005 deserves to be recalled / modified recalling the direction given to the Official Liquidator

for taking possession of the assets of the Company in liquidation.

4.This Court has issued notice on 14.06.2005 and leave to join Workers' Union, if any and Gujarat State Financial Corporation as party – respondents was granted.

5.On behalf of the applicant – Bank, further affidavit was filed by Shri K.K. Nair for the purpose of pointing out certain salient features and to put the record straight. Mr. J.T. Trivedi, learned advocate appearing for the applicant Bank has submitted that the applicant Bank did not know about the proceedings of winding up and no advertisement came to the notice of the applicant Bank. Because of the stay granted by this Court in Special Civil Application No. 17959 of 2003, the possession of the assets of the Company in liquidation pursuant to the notice under

Section 13 (2) of the Act on 10.10.2003 could not be taken. The Company in liquidation was declared a relief undertaking under the Bombay Relief Undertakings (Special Provisions) Act, 1958. The said Notification was not extended beyond its one year term, which expired on 05.11.2004. Ultimately, the interim relief granted in Special Civil Application No. 17959 of 2003 was vacated by an order dated 23.12.2004 and the main petition was withdrawn on 03.05.2005. The applicant Bank has also filed Special Civil Application No. 3670 of 2004 to challenge the order of attachment passed by the Tax Recovery Officer, Income Tax Department, Panchmahal Range, Godhra for dues amounting to Rs. 2.66 Crore + due interest, as outstanding, as also the public notice dated 01.03.2004 was issued in that regard. The said matter has been admitted by the Division Bench of this Court and had been pending. Despite all these litigations, the said Company has

suppressed the factum of the pendency of winding up petitions before this Court. On the contrary, there was an averment to the effect that dues and liabilities incurred and pending with the Govt. Agencies, namely, Sales Tax Authority, Income Tax Authority, workers' dues, electricity dues, etc. and the same were either settled amicably or in pipeline for the settlement and the said authorities have shown their willingness to forgo the interest and penalty portion and also substantial portion of the principal outstanding amount. All these averments were far from truth and were made only with a view to mislead this Court in those proceedings.

6.Mr. Trivedi has further submitted that the applicant Bank is justified in taking possession of the assets of the Company in liquidation in view of the provisions contained in the Securitisation Act as well as in view of

the judgment of the Hon'ble Supreme Court in *Allahabad Bank V/s. Canara Bank reported in AIR 2000 SC 1535* which permits a secured creditor to approach the DRT. In the Securitisation Act, there is inbuilt provision for safeguarding the rights of the workers, when winding up proceedings are going on in respect of a company. Section 13 (9) of the Securitisation Act clearly envisages that in case of a company being wound up on or after commencement of the said Act, the secured creditor of such company can opt to realise the security instead of relinquishing his security and may proceed under the said Act and also, appropriate sale proceeds, subject to depositing worker's dues with the Official Liquidator, calculated in terms of Section 529-A of the Companies Act, 1956. The applicant Bank is the sole secured creditor of the said Company and has opted to realise its securities under the Securitisation Act for recovery of

dues.

7.The Official Liquidator has filed his report on 14.07.2005 wherein he has submitted that the time limit stipulated under Section 13 (2) of the Act was 60 days which expired on 09.12.2003. However, the applicant Bank had not exercised any action under Section 13 (4) or any other relevant Sections of Securitisation Act and had initiated action of taking possession of the assets of the Company only on 18.04.2005 i.e. after this Court has passed the winding up order on 15.04.2005. The action of taking possession of the assets of the said Company by the applicant Bank is required to be declared as void against the Official Liquidator under Section 456 (2) of the Companies Act, 1956 and the applicant Bank may be directed to forthwith hand over the possession of the assets of the said Company to the Official Liquidator.

8. Based on the aforesaid affidavit and the submissions of Mr. Trivedi, this Court has passed an order on 08.08.2005 observing that since the possession has been taken over by the Bank under the provisions of the Securitisation Act, the same was not disturbed. However, the applicant Bank was directed to state on affidavit as to whether any inventory has been taken by the applicant Bank or security Guards have been deployed by them to safeguard the property. The applicant Bank was also directed to clarify as to whether insurance of the property in question was taken by the Bank. If the Inventory was not taken, in that case, the applicant Bank was directed to take help of the Official Liquidator. The applicant Bank was further directed to inform the Official Liquidator as well as the Court as and when the proceedings for sale of the properties in question would be initiated by the Bank.

9.Pursuant to the aforesaid order, one more affidavit was filed by the applicant Bank on 17.08.2005 wherein it is stated that inventory was made at the time of taking possession on 18.04.2005 in the presence of Panchas. The applicant Bank has got the property adequately insured and insurance policy for a total sum of Rs. 160 Lacs was taken for one year and it expired on 24.04.2006. The applicant Bank has employed a security agency to protect the property in question apart from getting the same insured. The applicant Bank was anxious to sell the properties in question as expeditiously as possible and further submitted that the proper modalities would be observed in accordance with the provisions of the Securitisation Act.

10.Pursuant to the said affidavit, this Court has passed an order on 29.11.2005 directing the

applicant Bank to state all the subsequent developments which have been taken place by way of an affidavit along with necessary papers and documents pertaining to the assets of the Company in liquidation. Accordingly, further affidavit was filed on behalf of the applicant Bank on 09.12.2005 wherein it is stated that the property, namely, land and buildings and plant and machinery of the Company in liquidation were sold after issuance of public notice in the dailies, namely, Vadodara edition of Indian Express & Divya Bhaskar on 18.09.2005. The sale has been effected by holding public auction on 18.10.2005. The land and buildings were sold for Rs. 131 Lacs and plant and machinery for Rs. 36 Lacs. The details of sale were furnished to the Official Liquidator by writing a letter dated 26.11.2005. The value realised was much more than the upset price and hence, the action of sale was perfectly just and proper and is

required to be approved. Since there was no other secured creditor and there were only 25 workmen employed in the factory, the applicant Bank was ready and willing to deposit the dues payable to the workmen on pari passu basis. The applicant Bank has approximately spent an amount of Rs. 4,50,000/- for defraying the expenses in connection with sale and for upkeep of the property and permission was sought for appropriation of the purchase consideration towards the outstanding dues of the applicant Bank.

11. Based on the said affidavit, this Court has passed an order on 16.12.2005 observing that despite the proceedings pending before this Court, the applicant Bank has proceeded with the sale of the properties. The issues which were raised by the applicant Bank were required to be considered and the Court, therefore, observed that the approval cannot be granted at

this stage. The Court has, therefore, directed the applicant Bank to keep the sale proceeds received by the applicant Bank in a separate account and it could not be appropriated towards outstanding dues of the applicant Bank. The Court has further observed that unless and until the sale is confirmed by this Court, the possession of the property should not be handed over and hence, the applicant Bank was restrained from handing over the possession to the purchasers till further order. The Court has also directed the Official Liquidator to verify as to whether the statement of affairs is filed by the Ex-Directors of the Company and if it is not filed, he was directed to place on record as to what steps he has taken. If the statement of affairs is filed, the Court has directed the Official Liquidator to furnish the details of creditors of the Company and the details of the workers of the Company, if the same were available with him.

12.On behalf of Gujarat State Financial Corporation, an affidavit is filed on 09.12.2005 wherein it is stated that the Company in liquidation has already paid the dues of the Corporation and the respondent No. 2 has also issued No Due Certificate to the Company in liquidation on 14.05.1996 and 28.04.1996. After issuance of No Due Certificate, the respondent No. 2 has nothing to do with the matter and hence, the name of the respondent No. 2 from this proceeding is required to be deleted.

13.Pursuant to the order passed by this Court on 16.12.2005, the Official Liquidator has filed his report on 22.12.2005 wherein he has stated that the Ex-Directors of the Company in liquidation have not filed statement of affairs as required under the provisions of Section 454 of the Companies Act, 1956 and therefore in

terms of the guidelines set out by this Court that before filing Criminal Case under Section 454 of the Companies Act, 1956 against the Ex-Directors of the Company a confirmation regarding Ex-Directors of the Company as on the date of winding up orders be sought from the office of Registrar of Companies. Accordingly, the Official Liquidator has written a letter to the office of Registrar of Companies on 05.08.2005 calling for the details of the Directors. However, he has not received any reply from the Registrar of Companies.

14.The Official Liquidator has further stated that in view of the recent judgment of the Hon'ble Supreme Court in the case of *Rajasthan State Financial Corporation and others V/s. Official Liquidator and another, (2005) 8 SCC 190*, the applicant Bank could not sell the assets of the company under State Financial Act to the exclusion of the Official Liquidator and

the distribution of the sale proceeds amongst the Creditors of the company has to be made by the Official Liquidator under the orders and directions of this Court. This order of the Hon'ble Supreme Court is also required to be taken into consideration under Securitisation Act and the steps initiated by the applicant Bank are required to be set aside with regard to the disposal of the assets of the Company since the same has been carried out by the applicant bank without permission of this Court.

15.The Official Liquidator has further stated that the applicant bank had not exercised any action under Section 13 (4) or any other relevant sections of the Securitisation Act and had initiated action of taking possession of the assets of the said Company only on 18.04.2005 i.e. after this Court has passed winding up order on 15.04.2005. The action

initiated by the applicant bank is either knowingly and willingly to avoid to take permission of this Court for disposal of the assets or had initiated steps for disposal of the assets of the said Company keeping this Court in dark. The applicant bank may be directed to deposit the entire purchase consideration with the Official Liquidator forthwith and thereafter, the Official Liquidator shall disburse the same amongst the Secured Creditors and the Workers of the Company in liquidation as per the provisions of Section 529-A of the Companies Act, 1956.

16.An affidavit is filed by one Mr. R.K. Modi, Senior Manager (Credit) of the applicant Bank on 31.12.2005 wherein it is stated that the decision of the Hon'ble Supreme Court relied upon by the Official Liquidator in the case of Rajasthan State Financial Corporation (Supra) is in relation to a state Financial

Corporation, while the present case concerns action taken by a Bank under the provisions of the Securitisation Act. The Official Liquidator has been informed about all the steps in the process of sale, but has nevertheless not chosen to make even a whisper save by filing his report on 23.12.2005. The proviso to Section 13 (9) of the Securitisation Act provides that in case of a Company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529A of the Companies Act, 1956. In case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under the proviso to sub-section (1) of Section 529 of the Companies Act, 1956 may retain the sale proceeds of his secured assets after depositing the workmen's

dues with the liquidator in accordance with the provisions of Section 529A of the Act. It is also provided that the liquidator referred to in the second proviso shall intimate the secured creditor of the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator. It is also provided that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator. The secured creditor is supposed to file an

undertaking to the liquidator to pay the balance of the workmen's dues, if any.

17.On the basis of this provision contained in the Securitisation Act, it is stated that the applicant bank is the sole secured creditor and is therefore entitled to resort to the provisions of the said section and hence, the Official Liquidator is nowhere in the picture qua the sale. Despite this fact, the applicant bank has made all endeavours to inform the Official Liquidator at every conceivable step in the process of sale. The Securitisation Act does not contemplate any formation of the Sale Committee. There is no question of parting with any machinery / equipment, as is not hypothecated. The sale is for value much more than the estimated value and everything was done in a lawful manner. Keeping all these facts in mind, a request was made to confirm the sale and allow the applicant bank to

appropriate the amount kept in the separate account.

18.Based on the aforesaid report as well as the affidavit of the applicant bank, this Court has passed an order on 18.01.2006 directing the applicant bank to show as to how the applicant bank was justified in taking the possession by exercising powers under Section 13 (4) of the Securitisation Act once the winding up order was passed by this Court and the Official Liquidator was directed to take over the possession of the other properties of the Company in liquidation. The applicant bank was further directed to inform as to whether before issuance of public notice on 21.04.2005 and before taking possession of the assets of the Company in liquidation on 18.04.2005, any notice was given to the Company. The Court has also directed the applicant bank to hand over the books of account, if any, lying in the

factory premises to the Official Liquidator after preparing inventory of such books of accounts.

19.Pursuant to the aforesaid order, an affidavit is filed by one Mr. R.K. Modi on behalf of the applicant bank reiterating the same facts which were earlier placed on the record of this case in the form of affidavits. It was stated that because of the pendency of the writ petition before this Court, the Company in liquidation being declared as Relief Undertaking under the Bombay Relief Undertakings (Special Provisions) Act, 1958, stay granted by this Court and talks of settlement, the possession could not be taken after issuance of the notice under Section 13 (2) of the Securitisation Act. Since the relief undertaking period was not extended, stay was vacated, settlement has failed, and ultimately the applicant bank has taken possession on 19.04.2005 under Section 13 (4)

of the Securitisation Act. It is, therefore, stated that there was no delay on the part of the applicant Bank to exercise its power under Section 13 (4) of the Act. Since the Company in liquidation has never pointed out to the applicant bank that the winding up proceedings are pending before this Court or that the order has already been passed, the applicant bank was not aware about the order directing the Official Liquidator to take over the possession. It is therefore stated that the prayer made in the Judges' Summons is required to be granted and sale undertaken by the applicant bank after informing the Official Liquidator as well as this Court and after observing all requisite formalities, is required to be confirmed.

20.From the pleadings of the party, Mr. J.T. Trivedi, learned advocate appearing for the applicant bank has relied on the provisions

contained in Section 13 (9) of the Securitisation Act. He has also relied upon the decision of this Court in the case of *State Bank of India V/s. Official Liquidator of Volvo Steel Ltd., [2004] 53 SCL 139 (Guj.)* wherein it is held that looking to the scheme of the Securitisation Act, it is clear that the Act has an overriding effect in view of the provisions contained in Section 36 of the Act. The applicant bank in that case being the Secured Creditor and after having complied with the provisions of Section 13 (9) was empowered to initiate such proceedings. However, since the matter was pending before the Company Court, a prior permission of the Company Court under Section 446 of the Companies Act was required to be taken and when such an application was moved to this Court, there was no reason for the High Court not to grant such permission. The Court has further held that so far as the question of sale of the securities

was concerned, the applicant-bank could not part with the assets of the Company by way of lease, assignment or sale. Even otherwise, before the sale is finalised, it is to be confirmed by the Company Court and at the time of confirmation of the sale, the Court would certainly look into the claim of workers and statutory dues of the Government. The Court has, therefore, granted the application to proceed with under Section 13 (9) of the Securitisation Act.

21.Mr. Trivedi has further relied on the decision of this Court in the case of *Indian Bank V/s. O.L. of Satnam Export (India) Limited decided on 09.03.2005 in Company Application No. 14 of 2004* wherein this Court has held that when a specific prayer is made to direct the Official Liquidator to hand over the possession to the Recovery Officer appointed by the Debts Recovery Tribunal, this Court is bound to

follow the judgment of the Hon'ble Supreme Court in the case of Allahabad Bank V/s. Canara Bank, (2000) 111 Company Cases 64 (SC) as in no uncertain terms, it is held that only Section 529-A is attracted to adjudication, execution and working out priorities, the Special Provisions made in the RDB Act have to be applied. The possession of the entire assets movable as well as immovable of the Company in liquidation will have to be handed over to the Recovery Officer appointed by the Debt Recovery Tribunal. The Recovery Officer shall undertake the task of sale of the properties of the Company in liquidation by following due procedure of law and in accordance with the statutory provisions. After the assets are sold and the amount is realised, the Debt Recovery Tribunal shall determine the priority claim of the secured creditors keeping in mind the provisions contained in Section 529A of the Act and before any distribution of the amount is

made amongst the creditors, the Official Liquidator taking care of the workmen's interest may also be heard in the matter.

22.From the aforesaid statutory provisions as well as legal pronouncement, Mr. Trivedi has strongly urged that the directions sought for by the applicant bank in the present application may be granted and the averments made by this Court in the impugned order of winding up directing the Official Liquidator to take possession of the assets of the Company in liquidation may be recalled. Since the assets of the Company in liquidation have already been sold during the pendency of this petition and all these facts are on record and Official Liquidator was informed from time to time, the sale may be confirmed in favour of the applicant bank and the sale proceeds may be allowed to be appropriated against the outstanding dues of the applicant bank subject

to workmen's claim under Section 529A of the Act.

23.The Official Liquidator, on the other hand, as observed earlier, has reiterated his submission that the applicant bank has taken the possession of the assets of the Company in liquidation after the winding up order is passed by this Court. The sale was undertaken by the applicant bank without taking any permission. Relying on the decision of the Hon'ble Supreme Court in the case of Rajasthan State Financial Corporation (Supra), he has submitted that the sale proceeds realised by the applicant bank out of the sale of the assets of the Company in liquidation may be directed to be deposited with the Official Liquidator so as to enable him to make proper distribution thereof in accordance with the provisions contained in Section 529 and 529-A of the Companies Act, 1956. In view of the

provisions contained in Section 37 of the Securitisation Act, the applicability of the provisions contained in the Companies Act, 1956 is not barred. Section 37 makes it very clear that the provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 and other Acts. Section 13 (9) and proviso thereto must be read in accordance with the provisions contained in the Companies Act, 1956.

24.Taking all these points into account, the Official Liquidator has submitted that either this Court should not confirm the sale or in the alternative sale proceeds realised by the applicant bank may be directed to be deposited with the Official Liquidator.

25.After having heard learned advocate appearing for the applicant bank and the Official

Liquidator and after considering their pleadings, affidavits, reports and other documents which have been placed on record, the Court is of the view that the applicant bank has taken possession of the Company in liquidation on 18.04.2005 by exercising its powers under Section 13 (9) of the Securitisation Act. It is true that this Court has passed the winding up order on 15.04.2005 and the Official Liquidator was directed to take possession of the assets of the Company in liquidation. However, these directions have not been carried out. Possibly the order might have not been communicated to the Official Liquidator. It is difficult to express any opinion on the fact as to whether the applicant bank was aware about the winding up order passed by this Court on 15.04.2005 and only with a view to overcome this difficulty, the possession was stated to have taken on 18.04.2005. Several affidavits filed on behalf

of the applicant bank make it abundantly clear that the applicant bank was not aware about the winding up proceedings nor even the order passed by this Court on 15.04.2005. The Court is of the view that in view of the provisions contained in Section 13 (9) of the Act, it becomes irrelevant as to whether the applicant bank was aware about the fact regarding winding up proceedings or the winding up order, on 18.04.2005. It is an admitted position that the applicant bank has issued notice under Section 13 (2) of the Securitisation Act. Because of the intervening circumstances, the applicant bank could not implement the said notice and possession could not be taken. When all the hurdles were removed, the applicant bank has taken the possession of the assets of the Company in liquidation. When the possession is with the applicant bank and the provisions contained in Section 13 (9) of the Securitisation Act empower the applicant bank

to retain such possession, the applicant bank is fully justified in moving the present application and praying for the direction to recall the order to the extent of issuance of direction to take possession of the assets of the Company to the Official Liquidator.

26.The reliance placed by the Official Liquidator on the decision of the Hon'ble Supreme Court in the case of Rajasthan State Financial Corporation (Supra) is not justifiable looking to the facts of the present case. The case of Rajasthan State Financial Corporation arose under the provisions of DRT Act and the action was taken by the Rajasthan State Financial Corporation under Section 29 of the State Financial Corporation Act. Keeping these two Acts in mind, the Hon'ble Supreme Court has sum up the legal position as under :-

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and

Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a Company in liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower Company in liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor Company in liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that Court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529-A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the Company in liquidation.

27.Even if it is assumed that the aforesaid directions are applicable to the cases arose under the Securitisation Act, the applicant bank has, more or less, complied with all these directions. The applicant bank has set in motion the proceedings under the Securitisation Act way back in 2003 by issuance of notice under Section 13 (2) of the Act. The possession was taken on 18.04.2005 and as soon as the applicant bank has become aware of the fact regarding winding up order passed by this Court, approached this Court seeking appropriate relief to allow the applicant bank to retain the possession of the assets of the Company in liquidation. During the pendency of this application before the Court, at all stages, the applicant bank has informed the Official Liquidator and this Court about the progress with regard to sale of the assets of the Company and necessary affidavits and

documents are also filed before this Court.

28.Over and above this, provisions contained in Section 13 (9) of the Securitisation Act empower the applicant bank to take possession as well as to proceed with the sale of the assets of the Company in liquidation. Section 13 of the Act deals with enforcement of security interest. Sub-section (2) states that where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-

section (4). The applicant bank has issued the notice under Section 13 (2) of the Act in the year 2003. 60 days time limit is prescribed only with a view to see that the secured creditor shall not take possession before the expiry of the period of 60 days. From this, it cannot be presumed that after expiry of period of 60 days, secured creditor cannot take possession. Under section 13 (4) of the Act, the applicant bank has taken the possession on 18.04.2005. Section 13 (4) (a) of the Act says that in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely, take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset. Section 13 (4) of the Act, therefore, empowers the secured

creditor not only to take possession but also empowers for sale of the assets of the borrower. It has come on record that the applicant bank is the sole secured creditor of the Company in liquidation and hence, there is no embargo contemplated in Section 13 (9) in relation to joint financing of a financial asset by more than one secured creditors or financing of a financial asset by more than one secured creditors and straightway the assets can be sold by the applicant bank subject to the proviso to Section 13 (9) of the Act. The first proviso says that in case of a Company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529 A of the Companies Act, 1956. The second proviso empowers the applicant bank to retain the sale proceeds of its secured assets after depositing the workmen's dues with the Liquidator in accordance with the provisions of Section 529

of the Act. The third proviso says that the Official Liquidator shall intimate the secured creditors the workmen's dues in accordance with the provisions of Section 529 A of the Act and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such a case, the secured creditor may retain the sale proceeds of the secured creditors after depositing the amount of such estimated dues with the Liquidator. The fourth proviso says that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator. The fifth proviso says that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

29.The combined reading of Sections 13(2), 13(4) and 13(9) with all the five proviso establishes beyond any doubt that the secured creditor is entitled to take possession of the secured assets, effect sale thereof and retain the sale proceeds realised on the sale of the assets after depositing the workmen's portion within the meaning of Section 529-A of the Act with the Official Liquidator. Once it is established that the applicant bank has acted in accordance with this provision, it is not just and proper for this Court not to grant the prayer made by the applicant bank in the present application. Not only this, the applicant bank is fully justified to undertake and to complete the sale and also to retain the sale proceeds thereof. However, since the workmen's portion is still not determined, the applicant bank is not entitled to appropriate the amount towards its outstanding dues. However, the expenses which

have been incurred by the applicant bank in undertaking the sale are allowed to be appropriated from the sale proceeds. The Court finds support from the above referred judgments and also from the provisions of the Securitisation Act, more particularly, Section 35 which says that the provision of this Act shall have effect notwithstanding anything inconsistent therewith, contained in any other law for the time being in force, or an instrument having effect by virtue of any such law.

30.In the above view of the matter, the Official Liquidator is hereby directed to inform the applicant bank about the workmen's claim under Section 529-A of the Act and if it is not determined, at least to inform about the estimated claim of the workers.

31.On receipt of this information from the

Official Liquidator, the applicant bank shall deposit the said amount with the Official Liquidator. Till then, entire amount should be kept in a separate account except the actual expenses incurred by the applicant bank for undergoing the sale and realizing sale proceeds thereof. The applicant bank shall also file an undertaking before the Official Liquidator that the applicant bank shall deposit the amount of workmen's claim as soon as the same is communicated by the Official Liquidator to the applicant bank. If there is any dispute about the amount of claim of the workers or secured creditors, if any, or any other matter, it shall be open for the parties to approach this Court for necessary clarification and/or order.

32. Subject to the aforesaid direction and observation, this application is accordingly allowed and prayer made therein as well as other prayers urged during the pendency of this

application are granted to the aforesaid extent without any order as to costs.

[K.A. PUJ, J.]

S*avariya*